QUARTERLY REPORT

July - September 1996

The **Quarterly Report** provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676.

In this report:

METAL DETECTORS AND THE FOURTH AMENDMENT

The increasing use by school districts of metal detectors, both hand-held and magnetometer, has resulted in a corresponding increase in litigation challenging such suspicionless searches as violative of the Fourth Amendment. However, the courts are generally upholding such practices where the school district can demonstrate the existence of a genuine concern (usually guns and other weapons) and the use of metal detectors is a pragmatic response to the existing concern. Earlier courts relied upon New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985) in addressing the use of metal detectors while recent court decisions are also referring to Vernonia School District 47J v. Acton, 115 S.Ct. 2386 (1995), the case involving random urinalyses of students to screen for drug use (see **Quarterly Report** Jan. - Mar.: 95 and Apr. - June: 95). From these cases, the following judicial trend has emerged regarding suspicionless searches by school officials using metal detectors.

1. While the Fourth Amendment applies to searches of students conducted by public school officials in furtherance of school policies, the standard to be applied to what constitutes an unreasonable search is much lower.

2. A student's subjective expectation of privacy, although recognized as legitimate, must be balanced against the school's substantial interest in maintaining discipline in the classroom and on the school grounds.

3. A court's function is to balance a student's legitimate expectation of privacy with the school's equally legitimate need to maintain an environment in which learning can take place.

4. A search by school officials is analyzed under a two-prong test: (a) Was the search justified at its inception? and (b) Was the search when conducted reasonably related in scope to the circumstances that justified the interference in the first place?

5. A search is justified at its inception if a school official believes there are reasonable grounds to suspect that a search will reveal evidence that a student has violated or is violating the law or the rules of the school.

6. A search is permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction (see "Strip Searches" in Recent Decisions, 1-12:95)

7. A search of a student by school officials need not be based upon probable cause. Such a search can be constitutional so long as there are special needs beyond the need for law enforcement which make the warrant and probable cause requirements impractical. These "special needs" have to exist within the public school context.

8. The test for "special needs" in the public school context, so as to depart from the warrant/probable cause requirements of the Fourth Amendment, is in three parts with reference to the competing interests of the individual and the State:

   (a) What is the nature of the privacy interest upon which the search intrudes?
   (b) What is the character of the intrusion, and is the intrusion minimal or significant?
   (c) What is the nature and immediacy of the governmental concern at issue and the efficacy of the means for achieving this governmental concern?

9. Broad-based administrative searches must be aimed at a group or class of people rather than a particular person, unless there is reasonable suspicion the particular person is violating a law or school rule.

10. Consent of the student to a random, suspicionless search related to a compelling governmental interest, such as demonstrated school violence, is not a requisite element for assessing the reasonableness of the search. Unlike airport passengers who can walk away, a student cannot elect to be truant in order to avoid metal-detector scannings.

11. The school district should have an articulated policy and guidelines for the use of metal detectors to ensure consistent, uniform procedures which militate against the inappropriate exercise of unbridled discretion by a school official.

12. Parents and students should have adequate notice of the school district's policy and the possibility of the use of metal detectors to further the school district's policy.

The following cases illustrate the application of this analysis.

1. People v. Dukes, 580 N.Y. S.2d 850 (N.Y. City Crim. Ct. 1992) is a pre-*Vernonia* case but often is cited as the seminal decision involving metal detectors and public school students. In 1989 the Board of Education established guidelines for the periodic utilization of metal detectors in the New York City high schools, with the stated purpose to prevent students from bringing weapons to school. In May 1991, a team of police officers from the Central Task Force for School Safety set up several metal detector scanning posts in the main lobby of a high school. There were signs posted outside the building alerting students that there was a search for weapons being conducted. Students has also been warned previously that periodic searches would occur. The officers could scan all students or selected students (every second or third student) but could not select a particular student unless there was a reasonable suspicion the student possessed a weapon. Students were scanned by officers of the same sex, although no touching of the person occurred. If the device is activated following two scans, the student is escorted to a private area where a more thorough search is conducted, including a pat-down. Dukes' bag activated the hand-held metal detector. She was requested to open the bag, which she did. The officer removed a manilla folder. Dukes was requested to open the folder, which

she did. Inside was a switchblade knife with a 4-5 inch blade. She was arrested. The court, in upholding the search, noted that school-based searches under the Fourth Amendment are "somewhat flexible" (at 851), but an "administrative search," such as this, "is never linked with probable cause or the issuance of a warrant." Id. The court gave as two examples of the "administrative search" the scanning at public buildings (airports, federal buildings) and highway checkpoints for drunk drivers (at 852). The court found a compelling governmental interest in providing a safe school environment. This, when coupled with the minimal intrusion of the scanning and the adherence to guidelines, justified the search and Dukes' resulting arrest (at 852-53). "Consent" is not a necessary component, as at an airport, because the student is required to go to school. A student cannot merely walk away and be truant (at 853).

2. In the Interest of F.B., 658 A.2d 1378 (Pa. Super. 1995). Applying T.L.O., the court upheld the school-based search for weapons which resulted in F.B.'s adjudication as a delinquent. As in Dukes, parents and students were notified throughout the year of the Philadelphia school district's policy against possessing weapons or drugs on school premises. The school district employs police officers to enforce this policy through in-house metal-detector scans and bag searches at the high schools. Signs are posted notifying students of these searches. The school district conducts its bag searches and metal-detector scans of each student or at random when the gymnasium becomes too crowded. The student was found to possess a Swiss-type folding knife, and was arrested. The court, in denying F.B.'s motion to suppress the evidence seized, held that the school did not have to have a reasonable suspicion or probable cause to believe the student was violating any school regulation. Although the T.L.O. decision does not address "individualized suspicion" as an essential element of the reasonableness standard for school-based searches, the court concluded there is no need for such "individualized suspicion" where the search was "part of a general regulatory scheme to ensure the public safety, rather than as part of a criminal investigation to secure evidence of crime" (at 1381). The intrusion here was minimal and was "no greater than necessary to satisfy the governmental interest justifying the search..." Id. "[T]he school's interest in ensuring security for its students far outweighs the juvenile's privacy interest." At 1382.

   The juvenile's expectation of privacy was greatly reduced further by the notice he received prior to the search. Id. Although the court believed the existence of guidelines would have been prudent, the officers did follow a uniform search procedure, thus satisfying the "other safeguards" concern expressed by the Supreme Court in T.L.O. The high rate of violence in the Philadelphia schools justified the search. The search was reasonable in light of these concerns and the uniform conduct of the search. Id.

3. In the Interest of S.S., 680 A.2d 1172 (Pa. Super. 1996). This case is similar to F.B., *supra*, and cites to it as precedent. The student also attended a Philadelphia public high school and was subjected to the same metal-detector scan and book bag inspection as F.B.. He was found to have a box cutter, was arrested, and was eventually adjudicated as

a delinquent. The S.S. court relied upon F.B., T.L.O., and Vernonia (which had been decided in the interim, upholding the random suspicionless urinalysis drug testing of student athletes). Although the court again stated it would have been prudent for school officials to notify students and parents of the school's search policy, the notice is not a prerequisite to a reasonable, school-based administrative search where the officers followed a uniform, exact procedure for conducting the metal-detector scans and book bag searches. This consistency of procedure and the concomitant supervision to ensure no officer exercises unbridled discretion overcomes the lack of established guidelines. The court did note, however, that there had to be a "history of violence" to justify such searches and render them "minimally intrusive." Where there is no such history of violence, the result may be different (at 1175-76).

4. People v. Pruitt, 662 N.E.2d 542 (Ill App. 1996). Based upon both T.L.O. and Vernonia, the court reversed the trial court's suppression of evidence that Pruitt possessed a gun at school. Pruitt attended a Chicago high school where there was a demonstrated history of violence. A metal-detector scan in November 1993 indicated he possessed something made of metal on his person. A protective pat-down search revealed Pruitt had in his pants pocket a .38 caliber revolver. He was arrested. In reversing the trial court's suppression of the evidence, the appellate court noted the school had a policy in the student handbook which prohibited guns, knives or other weapons, and further warned students they may be expelled or arrested for violating this policy. Magnetometers are by their very nature designed for searches, but are considered minimally intrusive. The absence of consent on the part of the student has little real impact on the balancing test for school-based administrative searches. The screening was justified at its inception because of the reality of violence in this school system and especially at this school. The search was conducted in a manner reasonably related in scope to the circumstances which justified the interference in the first place, including a recent shooting near the school involving students from the school. Although the appellate court found the screening reasonable, the judges did indicate they were "troubled by the failure of the Chicago Board of Education to establish strict standards for the use of metal detectors..."

SUICIDE: SCHOOL LIABILITY
(Article by Dana L. Long, Legal Counsel)

As suicide among school-aged children increases, the courts are being called upon to address issues concerning the liability of schools and school employees for failing to prevent the suicide or failing to provide notice to the parents of the student's suicidal tendencies. Theories of liability for schools have included negligence and violation of constitutional rights.

Tort Claims

Establishing negligence requires a showing of: (1) a duty of care; (2) a breach of that duty

through a negligent act or omission; (3) an injury; and (4) a proximate causal relationship between the breach of the duty and the injury.

1. Hoeffner v. The Citadel, 429 S.E.2d 190 (Sup.Ct. S.C. 1993), while dealing with the suicide of a military college student, provides useful guidance on duty, reasonable care, negligence and professional duty:

> The discharge of a duty requires the exercise of reasonable care. *See Hart v. Doe,* 261 S.C. 116, 198 S.E.2d 526 (1973) (negligence is the failure to use that degree of care which a person of ordinary prudence and reason would exercise under the same or similar circumstances). Reasonable care, in the context of professional negligence, requires the exercise of that degree of skill and care which is ordinarily employed by members of the profession under similar conditions and in like surrounding circumstances. *See King v. Williams,* 276 S.C. 478, 279 S.E.2d 618 (1981) (degree of care for a physician is that of an average competent practitioner in the same or similar circumstances). Thus, a professional's duty to prevent suicide requires the exercise of that degree of skill and care necessary to prevent a patient's suicide that is ordinarily employed by members of the profession under similar conditions and circumstances. *Accord Eisel v. Bd. of Education,* 324 Md. 376, 597 A.2d 447 (1991) (school counselors have a duty to use reasonable means to attempt to prevent a suicide when they are on notice of a student's suicidal intent); *Brandvain v. Ridgeview Institute, Inc.,* 188 Ga.App. 106, 372 S.E.2d 265 (1988), *aff'd,* 259 Ga. 376, 382 S.E.2d 597 (1989) (while there is no duty to guarantee that a patient will not commit suicide, there is a duty to the extent possible under reasonable medical practice to prevent suicide).
>
> Further, the question whether the duty has been breached turns on the professional's departure from the standard of care rather that the event of suicide itself. (Citations omitted.)

Hoeffner at 194.

2. In Eisel v. Board of Education of Montgomery County, 597 A.2d 447, 324 Md. 376 (Md. 1991), the court recognized that the relation of a school to a student is analogous to one

who stands *in loco parentis*, such that the school is under a special duty to exercise reasonable care to protect the student from harm. After considering a number of factors, including foreseeability and certainty of harm, policy of preventing future harm, closeness of connection between conduct and injury, and burden on the defendant, the court held that school counselors have a duty to use reasonable means to attempt to prevent a suicide when they are on notice of a student's suidical intent. This duty could include warning the parent of the danger.

3. In Brooks v. Logan, 903 P.2d 73 (Idaho 1995), the parents of a student who committed suicide brought a wrongful death action against a teacher (for failing to warn the parents of potential suicidal tendencies) and the school district (for failing to implement a suicide prevention policy). The Supreme Court of Idaho found that the school district was immune from liability based upon the discretionary function exception for any failure to implement a suicide prevention program, or failure to train its staff in such prevention. Routine, everyday matters not requiring the evaluation of broad policy factors, on the other hand, would likely be considered "operational," and not immune from liability. The teacher's alleged failure to warn the parents did not require an evaluation of financial, political, economic and social effects but rather the exercise of practical judgment. The court, also recognizing the doctrine of *in loco parentis*, stated "there is a duty which arises between a teacher or school district and a student. This duty has previously been recognized by this Court as simply a duty to exercise reasonable care in supervising students while they attend school." Brooks v. Logan at 79. The court found that the school district and the teacher, by state statute, had a duty to exercise reasonable care in supervising students and to act affirmatively to prevent foreseeable harm to students. The dispute was remanded to the trial court for a determination as to whether the teacher's failure to notify the parents of the student's suicidal thoughts was a negligent breach of this duty to prevent foreseeable harm and, if so, whether this breach was the proximate cause of the injury. Id., at 80.

4. Killen v. Independent School District No. 706, 547 N.W.2d 113 (Minn.App. 1996), provides further guidance on discretionary function immunity and official immunity:

> Discretionary function immunity protects a government entity from tort liability for a claim based on "the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." The purpose of discretionary function immunity is to preserve the separation of powers by protecting executive and legislative policy decisions from judicial review through tort actions.
>
> The critical question in determining whether discretionary function immunity applies is whether the specific conduct

> involves the balancing of policy objectives. A protected, planning level decision involves a question of public policy and the balancing of competing social, political, or economic considerations. Operational decisions, unlike planning level decisions, involve the day-to-day workings of a governmental unit, and these implementation decisions are not protected. (Killen, at 390, citations omitted)
>
> Because development of a suicide prevention policy involves questions of public policy and the balancing of competing interests, the development of a suicide prevention policy is a protected discretionary function. . . . The school district did not develop a suicide prevention policy. Discretionary function immunity protects both the development and the nondevelopment of a policy. (Killen, at 390, citations omitted)
>
> A public official charged by law with duties that call for the exercise of judgment or discretion is not personally liable to an individual for damages unless the official's actions are willful or malicious. This common law official immunity protects an individual's acts that call for the exercise of judgment and discretion. Acts that are nondiscretionary, imperative, or prescribed by policy, are not protected. (Killen, at 391, citations omitted)

5. In Fowler v. Szostek, 905 S.W.2d 336 (C.A. Tx., 1st Dist 1995), the parents of a student who committed suicide after she was disciplined for selling drugs brought an action against the school administrators. Summary judgment was granted in favor of the school administrators based upon official immunity.[1]

42 U.S.C. §1983

Section 1983 of the Civil Rights Act of 1871 (42 U.S.C. §1983) provides another possible area of liability for schools for student suicides. Damages for violation of a student's constitutional rights can be imposed upon both school corporations and school officials. Wood v. Strickland, 420 U.S. 308 (1975); Monell v. Department of Social Services, 436 U.S. 658 (1978). Section 1983 liability can be imposed upon schools for the sexual abuse of students by school personnel.

---

[1]The official immunity and discretionary immunity discussed in the Brooks, Killen and Fowler decisions are based upon state law. Indiana by statute provides for similar discretionary function immunity (I.C. 34-4-16.5-3) and immunity for public employees acting within the scope of their employment (I.C. 34-4-16.5-5).

Finding that students have a constitutional right to bodily integrity protected by the Due Process Clause of the Fourteenth Amendment, courts have held that school personnel may be liable for sexual abuse by a teacher if they knew of the abuse and acted with deliberate indifference by failing to stop it. Stoneking v. Bradford Area School District, 882 F.2d 720 (3rd Cir. 1989); Doe v. Taylor Independent School District, 15 F.3d 443 (5th Cir. 1994), cert. denied, ___ U.S. ___ (1994); Doe v. Rains Independent School District, 865 F.Supp. 375 (E.D.Tex. 1994); and Wilson v. Webb, 869 F.Supp. 496 (W.D.Ky. 1994).

Following the theories of the sexual abuse cases, in Wyke v. Polk County School Board, 898 F.Supp. 852 (M.D. Fla. 1995), the mother of a 13-year-old student who committed suicide brought a § 1983 civil rights suit and wrongful death action based on the failure of school administrators to prevent the student's suicide.[2] The § 1983 claim requires a violation of a constitutional right. The court found that the mother has a constitutionally protected liberty interest in her relationship with her son. "The familial right of association is protected by the liberty interest embodied in the substantive due process element of the Fourteenth Amendment. See Griffin v. Strong, 983 F.2d 1544, 1546-47 (10th Cir. 1993)." Wyke at 855. Unlike the sexual abuse cases where the injury was imposed by school personnel, this case involved the action by a third party (the student) which caused the injury. Citing DeShaney v. Winnebago County Dep't. Of Social Serv., 489 U.S.189 (1989), the court found "a state's failure to protect an individual against private violence does not constitute a violation of the substantive Due Process Clause." Wyke at 856.

The court further rejected the mother's argument that a "special relationship" existed creating a constitutional duty on the part of the school to protect her son from committing suicide. "In order to create a special relationship which imposes an affirmative duty on the state to protect an individual, the state must restrain the individual's freedom. *See generally Wooten v. Campbell*, 49 F.3d 696 (11th Cir. 1995)." Id. Such a duty arises only when the state takes a person into custody which renders the individual unable to care for himself. Estelle v. Gamble, 429 U.S. 97 (1976); Youngberg v. Romeo, 457 U.S. 307 (1982). Further, a state's compulsory attendance law does not create a special relationship between schools and students. D.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3rd Cir. 1992), cert. denied 506 U.S. 1079 (1993). "Schoolchildren are not like mental patients and prisoners such that the state has an affirmative duty to protect them." J.O. v. Alton Community Unit School District 11, 909 F.2d 267, 272-73 (7th Cir. 1990).

---

[2]While the court in this case granted the school's motion for directed verdict on the civil rights claim, the jury returned a verdict in favor of the plaintiff on the state negligence claim. The facts of the case indicated that the student had made two suicide attempts at school and that school personnel had been made aware of these attempts. The jury found that the school was partly responsible for the suicide due to the school's failure to notify the mother of the student's suicidal tendencies. The jury awarded the mother $165,000 in damages.

CONSENSUS AT CASE CONFERENCE COMMITTEES

A case conference committee has a range of responsibilities under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq., 34 CFR Part 300 and its Indiana counterpart, 511 IAC 7-3 et seq. (Article 7), including the responsibilities for the determination of eligibility for special education services, development of an individualized education program (IEP), and implementation of the IEP in the least restrictive environment (LRE) in order to ensure the student receives a free appropriate public education (FAPE). However, neither federal nor state law addresses how a case conference committee reaches conclusions involving the issues of eligibility, identification, placement, and any aspect of FAPE. The Indiana Department of Education has long encouraged such decisions to be reached by consensus among the case conference membership. No one should exercise "veto power" and vote-taking should be avoided. Taking a vote among the participants is an inherently divisive maneuver which often invites retaliation in some form.

Whether or not consensus has been achieved with respect to any particular matter is a responsibility of the case conference committee coordinator. If the parent disagrees, the parent may withhold written permission for placement or request a due process hearing. If the school disagrees, it may request a due process hearing. These procedural safeguards are in place in order to balance the relative positions of the two main participants (the parents and the school). Indiana has the added procedural safeguard requiring written parent permission for initial placements and all subsequent changes of placement. 511 IAC 7-12-1(p).

The Office Special Education Programs (OSEP) of the U.S. Department of Education acknowledged in a 1981 letter that federal law is silent in this respect, but added that "majority rule" would "be a reasonable manner in which to proceed." Letter to Coleman, EHLR 211:269 (OSEP 1981).

The method of decision-making in a case conference committee was a core issue in Hawes v. Plymouth Community School Board et al., Case No. 3:94cv956AS (N.D. Ind. Aug. 23, 1996). Hawes involved three due process hearings and administrative reviews (Art. 7 Hearings Nos. 697-93, 751-94, and 851-95). There were also three complaint investigations under 511 IAC 7-15-4. The parents and the school had originally agreed to a home-based instructional program through the mediation process under 511 IAC 7-15-3. However, a mediation agreement must be submitted to the student's case conference committee for approval under 511 IAC 7-15-3(e). The case conference committee rejected the mediation agreement because the placement was too restrictive. The case conference recommended a program in the local public high school. In the subsequent hearing, the independent hearing officer (IHO) found the school-based program appropriate. The Board of Special Education Appeals (BSEA) upheld the IHO's decision. The parents placed the student in a nonaccredited, nonpublic school, where she remains.

Relying upon Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986), the district court held "that majority rule voting is inappropriate in an IEP meeting... [W]hile a consensus between the school officials

and the parents is ideal, if no consensus is reached, 'the agency has the duty to formulate the plan to the best of its ability in accordance with the information developed at the prior IEP meetings, but must afford the parents a due process hearing in regard to that plan.'" Slip. Op. at 12, citing Doe v. Maher, 793 F.2d at 1490.

The court noted that the parents were provided ample opportunity to be involved in the case conference committees involving the student and took advantage of these opportunities, including attempting to institute their own "specific voting procedures." However, contrary to the parents' representations, no consensus was ever reached. "[I]f no consensus is reached, the local educational authority must prepare the IEP, which it has done. The Hawes have the right, and have exercised the right, to go to a due process hearing if they disagree with the IEP. The decision-making process within the case conference committee exercised by [the school] does not violate the procedural protection of the IDEA." Id.

1. Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986), the case relied upon by the Indiana federal district court, bears elaboration. Doe involved discipline under special education and is better known by its U.S. Supreme Court caption, Honig v. Doe, 484 U.S. 305, 108 S.Ct. 592 (1988). However, the 9th Circuit's observations on decision-making within the IEP team were not reviewed by the Supreme Court. The following are relevant points by the 9th Circuit:

> The defendants challenge vigorously the district court's ruling that when an IEP team convenes to review proposed changes in placement in response to misconduct, decisions shall be made by majority rule. They argue instead that such decisions are to be made by consensus. The parties raise a fundamental issue to which, surprisingly, there is no clear answer.
>
> The majority-rule view draws no express support from any relevant authorities. Moreover, such a policy seems inconsistent with the liberal provisions for expansion of IEP team membership. The regulations, to illustrate, provide that either parents or the agency may, at their discretion, invite additional persons to attend IEP meetings. See 34 CFR §300.344 (1985). This eliminates a key prerequisite to the utilization of majority rule, *viz*. a body having a fixed and specific number of members during the pendency of the issue sought to be resolved. Majority rule with a floating membership would encourage both sides in an IEP dispute to attempt to "stack the deck" by inviting numerous additional participants who shared the same views. It is inconceivable to us that Congress intended such a result. Therefore, we reverse the district court's judgment regarding majority rule.

A question remains, however, as to what principle of decision making should be employed. Decision by consensus has little utility with respect to issues whose intensely emotional nature makes reconciliation impossible. Perhaps the local educational agency has the power, after consulting with other IEP team members, to resolve any IEP issue that arises after an initial placement. In natural opposition to this position stands the interests of the parents. Although the [IDEA] clearly envisions an active participatory role for parents in the placement process [citations omitted], the Act nowhere explicitly vests them with a veto power over any proposal or determination advanced by the educational agency regarding a change in placement.

Despite its questionable utility for dealing with strongly contested issues, the consensus principle is supported by the [IDEA's] implementing regulations and their accompanying comments.

...

However, the Supreme Court's opinion in *Burlington School Committee v. Department of Education,* 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), qualifies the "consensus" inference. In discussing parents' participatory role in developing IEPs for their children, the Court observed that Congress, "[a]pparently recognizing that this cooperative approach would not always produce a consensus between the school officials and the parents, and that in any dispute the school officials would have a natural advantage, ... incorporated an elaborate set of what it labeled 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements." *Id.,* 105 S.Ct. at 2002.

We construe the Court's language as a recognition that, although the formulation of an IEP is ideally to be achieved by consensus among the interested parties at a properly conducted IEP meeting, sometimes such agreement will not be possible. If the parties reach a consensus, of course, the [IDEA] is satisfied and the IEP goes into effect. If not, the agency has the duty to formulate the plan to the best of its ability in accordance with information developed at the prior IEP meetings, but must afford the parents a due process hearing in regard to that plan. [Citations omitted.] Similarly, the parents have a right to a due process hearing should they believe that the IEP drafted by the local agency conflicts with the consensus reached at the meeting.

...

> We emphasize that parents may seek review of any decision they dislike and that, during the pendency of any such review proceedings, the child will remain in his or her current placement if the parents so desire.

Id., at 1488-1490.

CHILD ABUSE REGISTRIES

In 1993 Indiana created by statute a centralized computerized child abuse registry to collect data regarding "substantiated reports of child abuse and neglect." I.C. 31-6-11-12.1. The data to be entered includes, if known and applicable, the child's name and date of birth, the "alleged perpetrator's name," then names of the child's mother and father, the name of any sibling of the child, and the name of the child's guardian or custodian. There is a list of people who may have access to this data, including the "alleged perpetrator." However, the identity of the person who reported the alleged abuse is not available. When a "substantiated report" is entered into the registry, the "alleged perpetrator" is to be notified of this and provided an opportunity to request an administrative hearing to amend or expunge the report. I.C. 31-6-11-12.2. An administrative hearing is conducted by the Division of Family and Children. The standard of proof is whether or not there is some "credible evidence" that the "alleged perpetrator" is "responsible for the child's abuse or neglect." The administrative law judge (ALJ) is required to receive hearsay evidence and may not exclude such evidence based on technical rules of evidence. However, the ultimate determination cannot be based "solely on evidence that is hearsay." Because these proceedings are subject to the Administrative Orders and Procedures Act (AOPA), I.C. 4-21.5, judicial review is available to an aggrieved party. I.C. 31-6-11-12.3. There are also specific time frames for the Division of Family and Children to expunge or amend substantiated reports contained within the registry. (There is also a "Sex Offender Registry" to be maintained by the Indiana Criminal Justice Institute, but this registry deals with convicted sex offenders rather than allegations. See, generally, I.C. 5-2-12.)

There have been no reported cases involving Indiana's child abuse registry. However, court cases from other states with similar laws provide guidance.

Constitutional Issue: Right to Privacy

1. Nilson v. Layton City, 45 F.3d 369 (10th Cir. 1995). In 1981 Nilson was a teacher. He pleaded no contest to a charge of forcible sexual abuse. He received one year of suspended jail time, indefinite probation, and a $1,000 fine. He lost his teaching position and the State revoked his teaching certificate for one year. (See Cavarretta, *infra*.) Utah has a statute which reads in relevant part: "The Utah Bureau of Criminal Identification shall keep, index, and maintain all expunged and sealed records of arrests and convictions. Any agency or its employee who receives an expungement order may not

divulge any information in the sealed expunged records." At 370, footnote 1. In 1990, Nilson moved for an expungement order, which the court granted. However, the court never filed the expungement order with the arresting officials. Nilson had obtained a teaching position in 1984 at a different school district. In 1990, the school district began receiving information and complaints regarding Nilson's prior criminal history, including new complaints of sexual abuse. The arresting officer in 1981, in a television interview, related Nilson's 1981 arrest and conviction. This received widespread attention. The arresting officer had never received the expungement order, and there was no evidence he knew of the order. Nilson was convicted of the 1991 charges, but he was dismissed from his teaching position. He filed a civil rights action, claiming the post-expungement television interview and ensuing media publicity violated his constitutional right to privacy. The 10th Circuit Court of Appeals determined that one does not have a legitimate expectation of privacy in his expunged criminal records because criminal activity is not protected by any right to privacy. "An expungement order does not privatize criminal activity." The court added that the "underlying object of expungement remains public" because "[a]n expunged arrest and/or conviction is never truly removed from the public record and thus is not entitled to privacy protection." That is, an expungement order does not erase the personal knowledge one possesses regarding an arrest or conviction. There can be no "legitimate expectation of privacy in...expunged criminal records." At 372.

Constitutional Issue: Due Process and Reputation

2. Cavarretta v. Department of Children and Family Services (DCFS), 660 N.E.2d 250 (Ill. App. 1996). This case involved a public school physical education teacher who allegedly fondled a junior high school girl. An "indicated" report resulted in the teacher being placed on the State's register of suspected child abusers. The trial court reversed the ALJ, finding that the teacher was denied due process. The appellate court upheld the trial court, finding that the placement of a person's name on the State register of suspected child abusers without due process violates both the U.S. and State (Illinois) constitutions. The court, in addressing the Constitutional question implicating the Fourteenth Amendment, noted that damage to a person's reputation alone is not sufficient to implicate a liberty interest, but "stigmatization plus the loss present or future government employment is sufficient to rise to the level of a protectible liberty interest." Being placed on the State register of suspected child abusers does implicate a liberty interest because the "subject of an 'indicated' report may be prohibited from working in certain professions, such as child care and teaching...[A] teacher placed on the State register may have a difficult time retaining or acquiring a teaching position...[or]...may lose his teaching certificate."[3]

[3]A teacher's license in Indiana must be revoked permanently for certain serious convictions. See I.C. 20-6.1-3-7(b). A teacher's license may be revoked for immorality, misconduct in office, incompetency, or willful neglect of duty. I.C. 20-6.1-3-7(a);

The court also observed that there are a number of people who have access to the register, including school superintendents. "Being placed on the State register of suspected child abusers in not merely a negative reference from a previous employer." In this case, from the time of the initial report to the determination by the ALJ, nearly 600 days had elapsed. These inordinate "considerable" delays, which were not occasioned by the teacher, denied him due process because of the continuing stigmatization suffered by being on the register. Also see Carroll v. Robinson, 874 P.2d 1010 (Ariz. App. 1994) where the court found unalleged abuser's due process rights were violated by denying him an opportunity for a hearing to challenge the allegations.

Child's Competency to Testify

3. S.M. v. Florida Department of Health and Rehabilitative Services (HRS), 651 So. 2d 208 (Fla. App. 1995). S.M. was an elementary school teacher of students with mental retardation. Three students alleged he touched them inappropriately. HRS made a confirmed finding of child abuse and placed S.M. on the State's child abuse registry. S.M. sought expungement, but the ALJ denied the request. The court reversed and remanded. The ALJ's decision was based on hearsay and the telephone deposition of one of the students, who was ten at the time of the alleged occurrence and eleven when deposed. The student was " an educable mentally handicapped child...[with] an I.Q. of 70 or lower," but the deposition testimony did not establish that the student understood the difference between telling the truth and telling a lie, or whether he understood he had a moral obligation to tell the truth. The student's competency to testify was never established. The ALJ never personally observed the student or questioned him as to his competency. It was error for the ALJ to accept the deposition testimony. A child's competency cannot be established through hearsay. The court remanded to the ALJ.

Sufficiency of Physical Evidence

4. Korunka v. Department of Children and Family Services (DCFS), 631 N.E.2d 759 (Ill. App. 1994). Korunka, a teacher of 26 years, attempted to restrain physically a junior high school student with a history of discipline problems, including two incidents that date. The teacher stated he put his hands on the student's shoulders, but the student testified one hand was on his shoulder while the teacher's other hand was under his chin and on this throat. The student did have bruises on his throat, which faded within 48 hours and required no medical care. DCFS filed an "indicated report of child abuse" which the teacher sought to expunge. DCFS denied. The teacher requested a hearing before an administrative law judge, (ALJ), who sustained the report of child abuse but ordered it amended in part. The ALJ's decision was influenced by the student's father's testimony that the teacher demonstrated how he restrained the student (with one hand under the chin) and a remark by the teacher to an investigating officer that he may have acted

inappropriately. Upon judicial review, the trial court sustained the ALJ's decision, but the appellate court reversed, noting that "not every bruise results in a finding of harm." The actions by the teacher did not cause "death, disfigurement, any impairment of health, or any loss of bodily function." In addition, his actions did not amount to "excessive corporal punishment." As to the teacher's comment regarding his actions, the court observed that "inappropriate behavior does not necessarily amount to abuse. We need not determine whether Korunka could have handled the incident in another way."

Sufficiency of Investigation

5. Arkansas Department of Human Services (DHS) v. Caldwell, 832 S.W.2d 510 (Ark. App. 1992). An assistant principal at a middle school paddled three fifth grade students who had been caught smoking on the playground. The mother of one of the girls reported the paddling to the county Division of Children and Family Services as suspected child abuse. The caseworker "substantiated" the allegation of child abuse for excessive corporal punishment and recorded the assistant principal's name on the State Central Registry of alleged child abusers. An ALJ upheld the agency, but the trial court reversed, ordering the assistant principal's name stricken from the registry. On appeal, the appellate court affirmed the trial court's order of expungement, finding no credible evidence to support the maintenance of the alleged abuser's name in the State Central Registry. The three students knew smoking was prohibited. The assistant principal followed the normal routine for administering the paddlings, including obtaining another teacher as a witness. The teacher witness corroborated the assistant principal in that the "licks" administered were not excessive but were light. (The assistant principal and the teacher were both the same gender as the students.) The students did not appear to be harmed by the paddlings. The caseworker herself testified that she did not believe the paddlings constituted abuse, but she was required by DHS policy to substantiate abuse where bruises remain after 24 hours. The court viewed with disfavor this internal policy. "We do no believe that one factor, standing alone and applied as a litmus test, without all the attendant circumstances, is an appropriate measure to be used in all cases for determining whether an allegation of abuse is to be substantiated. There must be some exercise of judgment, as this is an area which does not lend itself to facile determination." At 513

RELIGIOUS CLUBS, EQUAL ACCESS AND PUBLIC SCHOOLS

In 1984, Congress enacted the Equal Access Act, 20 U.S.C. §§4071-4074. The legislative history of the Act is of little help to courts attempting to divine Congressional intent because the Equal Access Act, after being reported out of committee in the Senate, was extensively rewritten. However, it is agreed that Congress, in enacting the law, sought to end perceived discrimination

against religious extracurricular groups in public schools by mandating a policy of neutrality. As 20 U.S.C. §4071(a) provides:

> (a) **Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited**
>
> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

The Act defines "limited open forum" as an offer or the provision of an opportunity for "one or more noncurriculum related student groups" (see the Mergens case, *infra*) to meet on school premises during "noninstruction time." §4071(b). "Noninstructional time" means or time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends. §4072(4). See the Hsu case, *infra*. "Fair opportunity" is defined by uniform adherence to the following criteria:

1. The meeting is voluntary and student initiated;
2. The meeting is not sponsored by school or government employees;
3. Employees of the school or government may be present at the meeting but only in a nonparticipatory capacity;
4. The meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
5. Nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

§4071(c). There is also language at §4071(d) which seeks to harmonize the Equal Access Act with the First Amendment's Establishment Clause. Although this issue is present in the following cases, the courts have not found the Equal Access Act to violate the Establishment Clause. This article addresses only the application of the Equal Access Act to public secondary schools.

1. Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 110 S.Ct. 2356 (1990). This is the seminal case involving the Equal Access Act and its constitutionality. In this case, a Nebraska school district had approximately 30 student groups formed on a voluntary basis and, by board policy, each club had faculty sponsorship. Mergens, a student, sought to form a Christian club at the school which

would have been opened to all and would have permitted students "to read and discuss the Bible, to have fellowship, and to pray together." 110 S.Ct. at 2362. The school denied the request based upon the Establishment Clause of the First Amendment. Although the federal district court held the Equal Access Act did not apply because the school had not created a "limited open forum" because all the school's student clubs were "curriculum-related and tied to the educational function of the school," the 8th Circuit Court of Appeals reversed the district court. The 8th Circuit determined that many of the student clubs at the school were "noncurriculum related" and, hence, a "limited open forum" was created under the Act. The U.S. Supreme Court affirmed the 8th Circuit. The following are important determinations by the Supreme Court:

a. If a public secondary school allows one "noncurriculum related student group" to meet, the Equal Access Act's obligations are triggered, and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time. Id., at 2364, 2365.

b. The Equal Access Act does not define "noncurriculum related student group." Based upon other definitions in the Act and commonly accepted definitions of "curriculum," the court determined that "Any sensible interpretation of 'noncurriculum related student group' must therefore be anchored in the notion that such student groups are those that are not related to the body of courses offered by the school." Id., at 2365.

c. The question for a court is the degree of "unrelatedness to the curriculum" in determining whether a student group is "noncurriculum related." Id.

d. Although the legislative history of the Act is "less than helpful," the legislative purpose--to address perceived widespread discrimination against religious speech in public schools--is established. It is "Congress' intent to provide a low threshold for triggering the Act's requirements." Id., at 2366.

e. "[T]he term 'noncurriculum related student group' is best interpreted broadly to mean any student group that does not *directly* relate to the body of courses offered by the school." Id.

f. A student group "directly relates to a school's curriculum" if the subject matter of the group "is actually taught, or soon will be taught, in a regularly offered course"; if participation in the group is required for a particular course; or if participation results in academic credit. Id.

g. "Whether a specific student group is a 'noncurriculum related student group' will therefore depend on a particular school's curriculum, but such determinations would be subject to factual findings well within the competence of trial courts to

make." Id., at 2367. See the Pope case, *infra*.

h. "Curriculum related" does not mean anything "remotely related to abstract educational goals." Whether or not a school has created a "limited open forum" will depend upon "a school's actual practice rather than its stated policy." Id., at 2369.

i. Although the school did permit the religious club to meet informally after school, this was not "equal access" because other student groups with official recognition were permitted access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair.

2. Pope v. East Brunswick (N.J.) Board of Education, 12 F.3d 1244 (3rd Cir. 1993). Utilizing the Supreme Court's definition of "noncurriculum related student group," the 3rd Circuit Court of Appeals affirmed the district court's judgment in favor of the student and against her school for denying the Bible Club equal access to the public address system, the bulletin boards and other school facilities on the same basis as other school groups. Although the school board attempted to avoid Mergens by ensuring all student groups were curriculum related, one student group--the Key Club, a service group associated with the Kiwanis--was not directly related to the school's curriculum because (1) the group's subject matter is not taught, or soon to be taught in the school; (2) the group's subject matter does not concern the school's body of courses as a whole; (3) participation is not required in a particular course; (4) academic credit is not given for participation. At 1251, citing to Mergens, 110 S.Ct. at 2366. The Key Club's relationship to the school's curriculum is remote; thus it is a "noncurriculum related student group" and a "limited open forum" had been created, triggering the Equal Access Act. The court added at 1254 that although a "limited open forum" had been created, "we do not hold today that a school district can never close a limited open forum once such a forum has been created." A school could remove all "noncurriculum related student groups" and close the forum.

3. Ceniceros v. Board of Trustees of the San Diego Unified Sch. District, 66 F.3d 1535 (9th Cir. 1995). This Equal Access case involves a judicial construction of "noninstructional time" under 20 U.S.C. §4072(4). A student-initiated religious club wished to meet in a vacant classroom during lunchtime. All students at the high school have the same lunch period--11:30 a.m. to 12:10 p.m.--and may even leave the school grounds during this time. No instruction occurs during this time. Classroom instruction resumes at 12:15 p.m. Although §4072(4) defines "noninstructional time" as "time set aside...before actual classroom instruction begins or after actual classroom instruction ends," the 9th Circuit found that the school district had "set aside" the lunch period as "non-classroom, noninstructional time, which occurs 'after actual classroom instruction' ends for the morning session and 'before actual classroom instruction begins' for the afternoon." At 1537. The student-initiated religious group was entitled to the same access to classrooms

during the lunch period as other student groups.

4. Hsu v. Roslyn Union Free School District No. 3, 85 F.3d 839 (2nd Cir. 1996). This case arising out of New York involved not only the application of the Equal Access Act to a student-initiated "Walking on Water" Bible Club, but the question whether such a club's free speech rights in the expressive content of its meetings and the preservation of the group's purpose and identity permit the student group to require that its officers be "professed Christians either through baptism or confirmation." The school had created a "limited open forum." The Bible Club negotiated its existence through school officials, but the Club's proposed constitution had an exclusionary leadership policy which restricted the five officer positions to "professed Christians." The school's nondiscrimination policy prohibits any school-related function or group from discriminating against others, including discriminating on the basis of religion. The Bible Club would have been open to all, with the meetings devoted to prayer, singing and Christian fellowship. The court determined that two officer positions--secretary and activities coordinator--were ministerial functions unrelated to the overall purpose and character of the club and, hence, the club could not apply its exclusionary leadership policy on these two offices. "The leadership provision is defensible, however, as to the President, Vice-President, and Music Coordinator of the club, because their duties consist of leading Christian prayers and devotions and safeguarding the "spiritual content' of the meetings." The court concluded that the requirement that these three officeholders be Christians "is calculated to make a certain type of speech possible, and will affect the 'religious...content of the speech at [the] meetings,' within the meaning of the Equal Access Act." At 858, citing to 20 U.S.C. §4071(a). The court, in an accompanying footnote, added that judges and school administrators are both confused by Congress' undefined use of "religious speech" and the equally troublesome concern in defining "religion." So long as the religious test for these three leadership positions is "purely for expressive purposes" in ensuring that "meetings include the desired worship and observance" and is not raised for the sake of excluding others from the meetings, free speech rights are implicated and the religious test for leadership is constitutional. The court also makes two critical observations: (a) "The Act mandates that students be given 'equal access,' not that the School's internal rules be administered uniformly." At 860. (b) "This [decision] does not mean, however, that all efforts by a student club to exclude other students are protected by the statute [Equal Access Act], even if the exclusion is based on a club's desire to realize its expressive purpose. The Equal Access Act is not a set of federal handcuffs fitted to school principals. Schools must have rules to control their students, and rules will always have the effect of suppressing someone's idea for a club. Though the School's effort to apply its nondiscrimination rule is trumped by the Equal Access Act, the Act's mandate of equal access can be trumped by the School's responsibility for upholding the Constitution, for protecting the rights of other students, and for maintaining appropriate discipline in the operation of the school." At 862. Also see 20 U.S.C. §4071(f).

ER THE GOBBLE-UNS'LL GIT YOU
EF YOU
DON'T
WATCH
OUT![4]

In a recent Associated Press newspaper article, an Indiana public school corporation through its superintendent reportedly has asked teachers not to use black cats, ghosts or other Halloween symbols on school papers. The superintendent also discouraged the use of the term "Halloween," suggesting instead that such activities be known as "fall parties, harvest parties or some other neutral term." The AP dispatch indicated this action occurred following a single complaint from a parent that Halloween is a "witch festival." There have been several challenges the past few years to traditional holidays, school mascots, and literature selections. These challenges have been largely based upon unfounded suspicions that schools were seeking to endorse or promote religious ideals repugnant to the plaintiffs. These challenges have not been successful. The following are representative.

Halloween

In Guyer v. School Board of Alachua County (Fla.), 634 So.2d 806 (Fla. App. 1994) the plaintiff removed his children from elementary school on Halloween because he objected to the depiction of witches, cauldrons, brooms, and other traditional Halloween symbols. Plaintiff asserted these symbols and other Halloween observations violated the Establishment Clause of the First Amendment by promoting a religion known as "Wicca," which involves witchcraft. The court noted that the school employed Halloween symbols in a secular, non-sectarian manner and there was no attempt to teach or promote Wicca, Satanism, witchcraft or any form of religion. "[C]ostumes and decorations simply serve to make Halloween a fun day for the students and serve an educational purpose by enriching the educational background and cultural awareness of the students." At 807-08, noting that witches appear in many mainstream literary contexts. There was also in the school cafeteria a witch holding a wand with the caption, "What's cooking?" The court found that Halloween "enhances a sense of community" and is basically "fun." There are no violations of the Establishment Clause merely because some adherents to a particular religion have adopted some of the same symbols. "Witches, cauldrons, and brooms in the context of a school Halloween celebration appear to be nothing more than a mere 'shadow,' if that, in the realm of establishment cause jurisprudence." At 809.

Mascots

In Kunselman v. Western Reserve Local School District, 70 F.3d 931 (6th Cir. 1995), the circuit

[4]From "Little Orphant Annie" by James Whitcomb Riley (1885). The "Hoosier Poet" was never charged with violating anyone's constitutional rights by writing this poem.

court upheld a federal district court's grant of summary judgment to the school district regarding a challenge by the plaintiffs to the school's use of a "Blue Devil" as a mascot. The court found unreasonable the plaintiffs' assertion that the use of such a mascot promotes Satanism in violation of the Establishment Clause. The "Blue Devil" mascot came from the Duke University which, in turn, borrowed the name from an elite corps of French alpine soldiers who fought in World War II wearing blue berets and going by the *nom du guerre* "Blue Devils." The circuit court, quoting the district court's decision, found the mascot's use was entirely secular and did not have the primary or principal effect of promoting Satanism. Being personally offended does not create a constitutional violation. At 932-33.[5] Also see West Virginia v. Berrill, 474 S.E.2d 508 (W. Va. 1996) where the defendant's convictions for disrupting a public meeting and wearing a mask were upheld. Berrill, believing the school board did not take seriously his earlier concerns about the school district's use of a "red devil" as a mascot, disrupted a school board meeting by dressing in a devil costume and prancing around the room, frightening some children present.

Curriculum

1. Fleischfresser v. Directors of School District 200, 15 F.3d 680 (7th Cir. 1994). Plaintiffs sought to prevent the elementary school from using the *Impressions* reading series as the main supplemental reading program in grades K-5, contending the series violated the First Amendment's Establishment Clause by promoting "wizards, sorcerers, giants and unspecified creatures with supernatural powers," thus indoctrinating children in anti-Christian values. At 683. The 7th Circuit upheld the district court's dismissal of the action through summary judgment for the school district. The 7th Circuit reiterated that schools have broad discretion in selecting curriculum, and courts should only interfere where constitutional values are "directly and sharply implicated." At 686. In this case, the plaintiffs failed to demonstrate that any coherent "religion" was being promoted even accepting the argument that the reading series contains concepts found in "paganism and branches of witchcraft and Satanism." At 687. A K-5 reading series should serve to stimulate a child's imagination, intellect and emotions. Expanding children's minds and developing their sense of creativity is not an "impermissible establishment of pagan religion." At 688. Works cited by the court include C.S. Lewis, A.A. Milne, Dr. Suess, Ray Bradbury, L. Frank Baum, and Maurice Sendak. The Court also rejected the plaintiffs assertions that stories with witches, goblins and Halloween violated the Establishment Clause, holding instead that Halloween is an "American tradition" and is a purely secular affair. Id., at footnote 8. The court also noted that the reading series contains stories based upon Christian beliefs, but any "religious references are secondary, if not trivial" when the overall purpose of the reading series is considered. At 689.

2. Brown v. Woodland Joint Unified School District, 27 F.3d 1373 (9th Cir. 1994). Similar

[5]It would be more interesting to know why Wake Forest's mascot is the "Demon Deacon."

to Fleischfresser, plaintiffs attacked the *Impressions* reading series as violating the First Amendment's Establishment Clause by promoting "religion" while violating plaintiffs' right to free exercise of their own beliefs. *Impressions* is a series of 59 books with approximately 10,000 literary selections and classroom activities. "The selections reflect a broad range of North American cultures and traditions." At 1377. Plaintiffs challenged 32 of the selections, contending these selections promote the religion of "Wicca" (witchcraft). The selections do refer to witches and some related classroom activities include pretending one is a witch or sorcerer and creating a poetic chant. In affirming the district court's summary judgment in favor of the school district, the 9th Circuit Court of Appeals viewed favorably the school district's review committee, which was established following complaints from parents. The review committee included a Christian minister. The review committee found no connection between the reading series and the occult. As the 7th Circuit noted, the *Impressions* reading series was developed to serve a secular purpose related to the education of elementary school children and was not designed to promote any religion, although certain selections involving faith traditions and folklore in America are a part of the series, including selections involving the Christian faith. Coincidental resemblance to certain religious practices does not amount to a constitutional violation. At 1381. The court also rejected the plaintiffs' assertion that the challenged selections are designed "through the use of neuro-linguistic programming" to "foster and promote" a "magical world view that renders children susceptible to future control by occult groups' and make them "more likely to become involved in occult practices later in their lives." At 1382.

Perhaps the "Gobble-uns" will get them...if they don't watch out!

TRIENNIAL EVALUATIONS

The Individuals with Disabilities Education Act (IDEA) requires that each student with a disability who requires special education be evaluated at least once every three years, or more frequently should conditions warrant. See 34 CFR §300.534(b). The Indiana State Board of Education's rule reflects the federal requirement. See 511 I.C. 7-10-3(o). The regulations for triennial evaluations do not include any exceptions or any specific right of a parent, guardian or the student to avoid the evaluative process. This became the focal issue in Johnson v. Duneland School Corporation, et al. , 92 F.3d 554 (7th Circuit 1996).

The student had significant medical problems, including seizure activity and leukemia, along with mental retardation. His medical condition resulted in his being placed on homebound instruction. However, as medication stabilized his condition, his physician recommended he attend school again. The school sought to reevaluate the student and asked the parents for a release of medical information. Instead the parents sought a due process hearing challenging the school's proposed program and seeking reimbursement for an independent evaluation obtained by the parents. The parents did not raise the triennial evaluation as an issue nor did they

challenge the propriety of the proposed evaluation. A number of due process issues were raised during the hearing, before the Indiana Board of Special Education Appeals, and upon judicial review in the federal district court (see **Quarterly Report** July - Sept.: 95). However, most of these issues were not raised in the appeal of the district court's decision to the 7th Circuit Court of Appeals.

On appeal, the 7th Circuit addressed only one issue while affirming the district court's grants of summary judgment to the school and other defendants: Whether the school has an absolute right to conduct a three-year reevaluation.

The 7th Circuit joined other circuit courts in holding that schools have a right to conduct the three-year reevaluation. The court reasoned that "because the school is required to provide the child with an education, it ought to have the right to conduct its own evaluation of the student and the school cannot be forced to rely solely on an independent evaluation conducted at the parents behest." At 558. Parental consent is not required under such circumstances. Id.

The court, relying upon a decision from the 5th Circuit (see below), also rejected the proposition that there is an exception to the school's right to reevaluate based upon alleged medical and psychological harm to the student should the evaluation occur. The 7th Circuit did not characterize the school's right as "absolute," as other courts have done. A school's right to reevaluate, the court noted, is balanced in Indiana with the parent's right to challenge through the due process hearing process any proposed evaluation by the school. But where a parent does not raise this as an issue, as in the case, the school's right is "absolute." Id.

Two other cased involving the school's right to conduct the triennial evaluation are as follows:

1. Andress v. Cleveland Independent School Dist., 64 F. 3d 176 (5th Cir. 1995). This is the principal case the 7th Circuit relied upon. The student was identified as having a learning disability. He was hospitalized following hazing incidents which became physical assaults. When discharged from the hospital, he received homebound instruction. The school sought to conduct the three-year reevaluation, but the parents opposed this because they believed any further assessments would traumatize the student. Instead, the parents obtained independent evaluations, but these did not meet the requirements of state law. As a consequence, the school could not rely upon the results. A due process hearing officer held this school could not be compelled to accept the independent assessments in lieu of completing its own reevaluation. The 5th Circuit upheld the hearing officer, reversing the district court's finding that there could be supervening reasons for preventing the school from conducting its reevaluation. The 5th Circuit held "that there is no exception to the rule that a school district has a right to test a student itself in order to evaluate or reevaluate the student's eligibility under IDEA."

2. Doe v. Phillips, 20 IDELR 1150 (N.D. Cal. 1994). This case was cited by the Andress court, and is similar to the underlying facts in that case. The parent provided the school

with results of independent evaluations, but refused to permit the school to evaluate her son, claiming the possibility that any further assessment by the school would traumatize the student. A due process hearing officer did not agree and neither did the federal district court. The school had the right to assess the student using its own personnel.

ADMINISTRATIVE PROCEDURES: GRANTING OF EXTENSIONS OF TIME

The Indiana Supreme Court has resolved a conflict in the Court of Appeals regarding whether a state agency with adjudicative responsibilities subject to the Administrative Orders and Procedures Act (AOPA), I.C. 4-21-5, can grant an extension of time to a party beyond the fifteen (15) days established for filing objections with the state agency with respect to the decision of an administrative law judge. The Supreme Court, 4-1, held that a state agency does have the authority to do so.

In Charles A. Beard Classroom Teachers Association v. The Charles A. Beard Memorial School Corporation, 668 N.E.2d 1222 (Ind. 1996), an administrative law judge (ALJ) for the Indiana Education Employment Relations Board (IEERB) ruled against the teacher's union on an unfair labor practice complaint. The union timely sought a continuance of the fifteen-day deadline for filing objections with the IEERB under I.C. 4-21.5-3-29(d)(2).[6] IEERB's regulation at 560 IAC 2-6-8 permits adjudicators of causes before the IEERB to "extend the time by which an act may be accomplished" but only "[f]or good cause shown..." The IEERB granted the continuance, and eventually reversed the ALJ and ruled in favor of the union. The trial court reversed IEERB, finding that the 15-day timeline is jurisdictional. IEERB could not extend the timelines. As a consequence, IEERB could only affirm the decision of the ALJ. The Court of Appeals affirmed the trial court because the statute does not permit extensions of time and the teachers' union did not object within the statutory time limit. IEERB was without jurisdiction to entertain an appeal of the ALJ's decision.

The Supreme Court reversed the Court of Appeals finding that state agencies have the authority to promulgate administrative rules allowing for extensions of time for filing objections in certain cases subject to AOPA. Although the Supreme Court noted an agency may not adopt rules or regulations that are outside the scope of its power as conferred by the legislature, agencies do have implicit powers to issue rules to effectuate their respective regulatory schemes as outlined

---

[6] I.C. 4-21.5-3-29(d)(2) provides:

> (d) To preserve an objection to an order of an administrative law judge for judicial review, a party must not be in default under this chapter [AOPA] and must object to the order in a writing that: ...
> (2) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days (or any longer period set by statute) after the order is served on the petitioner.

by statute (at 1224-25). "The IEERB presumably believed providing for extensions of time in which to file objections would aid it in carrying out its responsibilities under the Collective Bargaining Statute [I.C. 20-7.5 *et seq.*]..." Id. The IEERB, the court reasoned, had at least the implicit power to grant the timely request for an extension of time to file objections. This would be consistent both with IEERB's statutory responsibilities and AOPA requirements.

While this decision addresses extensions of time under AOPA, it has little effect upon most adjudications by the Indiana State Board of Education (SBOE) and no effect upon the procedures of the Board of Special Education Appeals (BSEA).

Most SBOE adjudications are not governed by AOPA. See I.C. 20-8.1-6.1-10 (c). However, the SBOE does borrow the time frame at I.C. 4-21.5-3-39(d)(2) for filing objections to recommended decisions of its hearing examiners.

Although BSEA procedures indicate the AOPA will be followed when it reviews the decision of an Independent Hearing Officer, 511 IAC 7-15-6(d), it also indicates the AOPA will be read in concert with special education requirements. Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq., 34 CFR Part 300, hearing rights and timelines are established, including the specific right to grant extensions of time "at the request of either party." 34 CFR §300.512(c). See generally 20 U.S.C. §1415 and 34 CFR §§300.506-300.513 for IDEA hearing rights.

The Indiana Professional Standards Board (IPSB) is required to conduct its adjudications under the AOPA. See I.C. 20-1-1.4-10, I.C. 20-6.1-3-7, and 515 IAC 1-2-18(i). However, the IPSB has broad rule-making authority analogous to IEERB's actual and implied authority which the Supreme Court found sufficient to support its granting of the extension of time.

COURT JESTERS: THE CAUSTIC ACROSTIC

You may very well wonder whether judges take umbrage at the published dissenting opinions of their fellow members of the bench. Judges are human. They put their pants on one leg at a time (even though their briefs are legal). Of course they bristle at such criticisms. Some judges had the opportunity to strike back--not once but twice--at the stinging dissenting opinion of a fellow justice.

In People v. Arno, 153 Cal. Reporter 624 (Cal. App. 1979), a majority of the justices reversed the defendants' conviction for possession of obscene films with the intent to distribute. One justice vociferously dissented, so much so that the following appeared at footnote 2 at 628:

> We feel compelled by the nature of the attack in the dissenting opinion to spell out a response.

1. **S**ome answer is required to the dissent's charge.
2. **C**ertainly we do not endorse "victimless crime."
3. **H**ow that question is involved escapes us.
4. **M**oreover, the constitutional issue is significant.
5. **U**ltimately it must be addressed in light of precedent.
6. **C**ertainly the course of precedent is clear.
7. **K**nowing that, our result is compelled.

At first blush, this may appear to be a mild response. However, the majority indicated it wished to "spell out a response," which is what they did. The first letters spell out a well known Yiddish insult.[7]

QUOTABLE...

> If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.

Justice Robert H. Jackson, Illinois ex rel. McCollum v. Bd. of Education of School Dist. No. 71, 333 U.S. 203, 235 (1948) concurring with the majority that the school district's "released time" for students to attend religious classes in the public school violated the First Amendment's Establishment Clause but expressing concern with the excessive demands of the plaintiff, an atheist, that the court forbid all references to religion in any publicly funded school.

UPDATES

1. Dress Codes. In **Quarterly Report** July-Sep't: 95, there was a report on the Pyle case continuing in Massachusetts. Referred to by the court as the "tee-shirt turmoil," the case involves free speech issues, reasonable regulation of student attire, and tee-shirt messages

[7]This type of literary insult, although rare, has occurred before. The most famous was published in the prestigious *Poetry* magazine in 1939. The target was Nicholas Murray Butler, a brilliant, remarkable educator who ran as Vice President with William Howard Taft on the Republican ticket in 1912. Unfortunately, Dr. Butler had the same elevated opinion of himself. Noted poet and educator Rolfe Humphries submitted to *Poetry* a poem entitled "Draft Ode for a Phi Beta Kappa Occasion." Written in the classical style, the first letters spelled "NICHOLAS MURRAY BUTLER IS A HORSES ASS." Neither *Poetry* nor Dr. Butler were amused. See *Poetry* (June 1939 and August 1939) or More Misinformation by Tom Burnam, pp. 25-27 (Ballantine Books).

which are considered obscene, lewd, vulgar or demeaning. The 1st Circuit Court of Appeals deferred ruling on the constitutional issues until the State court ruled on the following certified question: Do high school students in public schools have the freedom under state law to engage in non-school-sponsored expression that may reasonably be considered vulgar, but causes no disruption or disorder? The Massachusetts Supreme Judicial Court has determined that their State law on student rights includes expression of views through speech and symbols, without limitation. There are no exceptions for "arguably vulgar, lewd, or offensive language absent a showing of disruption within the school." Pyle v. School Committee of South Hadley, 667 N.E.2d 869, 872 (Mass. 1996).

2. Child Abuse: Reporting Requirement. In **Quarterly Report** Oct.-Dec.: 95, the case of Wojcik v. Town of North Smithfield was reported. This case involved the balancing between familial integretity and the governmental interest in protecting children from suspected abuse. In this case, school officials and a local rape crisis center each reported suspected child abuse based on statements and reactions by one of the plaintiffs' children in one instance and statements by the plaintiffs' other child in the second situation. Journal entries by one of the children also lead to concerns of physical abuse. Investigations of these concerns did not substantiate any abuse, and the cases were closed. The federal district court ruled in the school district's favor. The 1st Circuit Court of Appeals affirmed, noting that a "reasonable suspicion" is the threshold for initiating a report of suspected child abuse. It is not the school's responsibility to investigate the complaint. The school's actions were reasonable, and school officials acted in good faith. "Where government officials act reasonably and in good faith, there is usually no federal remedy. If the Wojciks were encouraged to think otherwise, their advisors were mistaken." Wojcik v. Town of North Smithfield, 76 F.3d 1, 3 (1st Cir. 1996).

3. Community Service. In **Quarterly Report** Oct.-Dec.: 95, it was reported that courts are supporting school initiatives to include community service components in the curriculum and, in some cases, requiring a certain number of hours be completed as a graduation requirement. Courts have not found that such programs violate the Establishment Clause of the First Amendment by promoting "altruism," nor does community service constitute involuntary servitude under the Thirteenth Amendment or violations of due process under the Fourteenth Amendment. Since that report, there have been additional legal proceedings in two cases.

   Herndon v. Chapel Hill-Carrboro City Board of Education, 89 F.3d 174 (4th Cir. 1996). The circuit court affirmed the district court's decision in favor of the school district, finding that the school's requirement that student's fulfill 50 hours of community service in order to graduate did not violate the parents' right to direct the education of their children, nor was such a requirement involuntary servitude. The circuit court also noted that while the common law did not impose a duty to serve others, "the absence of a common-law duty does not imply a constitutional prohibition against the imposition of such a duty." There is no right under the Fourteenth Amendment to be free from compulsory charitable service such as is involved here. At 179-80.

Immediato v. Rye Neck School District, 73 F.3d 454 (2nd Cir. 1996). The U.S. Supreme rejected the plaintiffs' appeal of the 2nd Circuit's decision in favor of the school district's requirement that students complete 40 hours of community service in order to graduate. (Case 95-1861, cert. den.) See 65 LW 3256.

Date: _____

Kevin C. McDowell, General Counsel
Indiana Department of Education
Room 229, State House
Indianapolis, IN 46204-2798
(317) 232-6676
FAX: (317) 232-8004

`

ON LINE: **Quarterly Report** will be on line soon under the Indiana State Board of Education's page.